

United Parcel Service of Ohio and Daniel P. Kane.
Case 21-CA-27855

October 15, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

On February 1, 1991, the Regional Director issued a complaint and notice of hearing alleging that the Respondent has engaged in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the National Labor Relations Act. Subsequently, the Respondent filed its answer, admitting in part and denying in part the allegations of the complaint, and raising an affirmative defense. As an affirmative defense, the Respondent contends that an arbitrator has already found that the employees named in the complaint were not terminated in violation of the collective-bargaining agreement between the Union and the Respondent, or the Act, and that the Board should defer to the arbitrator's finding and dismiss the complaint.

Thereafter, on April 8, 1991, the Respondent filed with the Board in Washington, D.C., a Motion for Summary Judgment/Dismissal, with exhibits attached, renewing its contention that the Board should defer to the arbitrator's decisions regarding the discharges.

On April 19, 1991, the Board issued an order transferring the proceeding to the Board and Notice to Show Cause why the Respondent's motion should not be granted. On April 29, 1991, the General Counsel filed a response, arguing that the Board should not defer because the arbitrator did not measure the discriminatees' conduct by the appropriate Board standard and, therefore, his awards are palpably wrong and not worthy of deferral. In the alternative, the General Counsel contends that there are sufficient issues of fact and law warranting resolution before an administrative law judge.

On May 20, 1991, the Charging Party filed a brief in opposition to the Motion for Summary Judgment contending that the Board should not defer because the arbitrator's awards are palpably wrong, that the Union did not present the statutory issues to the arbitrator, and that the Board should not apply the general rules governing deferral to arbitrators' awards set forth in *Olin Corp.*, 268 NLRB 573 (1984), in this case. In particular, the Charging Party urges the Board to reject *Olin's* requirement that the party contesting deferral has the burden of proving the deferral criteria are not met. In this regard, the Charging Party argues, as to the Charging Party himself, that he is a union dissident who cannot count on the Union to fully and effectively advocate his position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on the Motion for Summary Judgment

The facts here are essentially uncontested. The Charging Party, as a shop steward, prepared grievances concerning the Respondent's installation of a metal detector at the facility. These grievances, with nine signatures including those of the Charging Party and another steward, were submitted to the Respondent. At a series of individual grievance meetings, two employees withdrew their grievances. The other seven employees were ultimately terminated for dishonesty and falsification of their grievance documents and were not reinstated. Grievances over these terminations went to arbitration. The issue presented to the arbitrator in each case by mutual agreement of the Union and the Respondent was "Did the company violate the Labor Agreement or the National Labor Relations Act when it discharged the Grievant?"

The arbitrator denied each of the grievances and upheld the terminations. With respect to the Charging Party, the arbitrator found that he "deliberately made false orchestrated statements on his Grievance Report and then persisted in them through the grievance meeting until he realized his falsehoods had been detected." The arbitrator concluded that "there is no absolute protection in the National Labor Relations Act or in the collective bargaining agreement for a Union Steward who deliberately" engages in such conduct. The arbitrator similarly found as to the other grievants that they had made false statements on their grievance reports and at grievance meetings in order to establish a basis for backpay to which they were not entitled, and that their conduct was not protected under the collective-bargaining agreement or the Act.

We find it appropriate to defer to the arbitration awards upholding the terminations in accordance with *Olin Corp.*, 268 NLRB 573 (1984). In that case, the Board set forth the standards under which it would defer to an arbitrator's award, consistent with the standards set forth in the *Spielberg Mfg. Co.* decision (112 NLRB 1080 (1955)). The Board held it would defer where the proceedings appear to have been fair and regular, all parties have agreed to be bound, the decision of the arbitrator is not clearly repugnant to the Act, and the arbitrator has adequately considered the unfair labor practice issue. As to the last standard, the Board stated that it would find that an arbitrator had adequately considered the unfair labor practice if the contractual issue is factually parallel to the unfair labor practice issue and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. The Board also explained what it intended by the "clearly repugnant" standard. It would

not require that an arbitrator's award be totally consistent with Board precedent, but would only find an award to be deficient under that standard if it is not susceptible to an interpretation consistent with the Act. Finally, the Board placed the burden on the party seeking to have the Board reject deferral to show that these standards have not been met.

In this case, the first deferral criterion is satisfied because there is no evidence that the grievance proceedings were not fair and regular.¹ Similarly, we find that all parties have agreed to be bound, in the absence of evidence or argument to the contrary.

We also find that the General Counsel and Charging Party have failed to establish that the awards are clearly repugnant to the purposes and policies of the Act. The arbitrator essentially determined that the conduct for which the employees at issue were terminated was not protected under the Act. Contrary to the arguments of the Charging Party, this determination is clearly consistent with Board precedent holding that conduct associated with filing grievances is not absolutely protected, but instead can lose the Act's protection under certain circumstances. See, e.g., *Roadmaster*, 288 NLRB 1195 (1988). Even the General Counsel concedes that conduct associated with the filing of grievances can lose its protection if a false claim is made in bad faith, but urges that the arbitrator made no such determination here. We reject the General Counsel's argument that the arbitrator's award is palpably wrong in this respect. Although the arbitrator did not use the words "bad faith," the arbitrator's treatment of the Charging Party's conduct of "deliberately" making "false orchestrated statements" and similar treatment of the other grievants' conduct are clearly consistent with findings of bad faith. Thus, there is no indication

¹ To the extent that the Charging Party's argument that *Olin* should not be followed because the Charging Party grievant cannot count on the Union to adequately represent him can be construed as an assertion that the proceedings are not fair and regular, we find that there is inadequate evidence in the record to support such an assertion. It is well established that the Board will not defer where the interests of the alleged discriminatees are in conflict with those of their union. See, e.g., *Dresser Industries*, 289 NLRB 90 (1988); *Tubari Ltd.*, 287 NLRB 1273 (1988); and *Aristo Foods*, 198 NLRB 543 (1972). However, the Charging Party has not met his burden of showing such a conflict here beyond his unsupported assertions that the Union was hostile to him, nor has he shown any irregularity in the Union's handling of the Charging Party's grievance. Indeed the Union took the grievance to arbitration and appeared to represent the Charging Party in the same manner as the other grievants.

In this connection, we disagree with the Charging Party's assertion that it is inappropriate to apply the burdens established by *Olin* to the facts here. The Board in *Olin* reasoned that the party seeking to have the Board ignore the arbitrator's determination should have the burden of affirmatively demonstrating the defects in the arbitral process or award. We do not see any facts here justifying a departure from that reasoning.

that the arbitrator's resolution of these grievances is repugnant to the Act.

With regard to the final deferral criterion referred to in *Olin*, as stated previously, in order to determine whether the arbitrator adequately considered the unfair labor practice, the Board must decide both if the contractual issue is factually parallel to the unfair labor practice issue and if the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. Further, we again observe that the burden rests with the General Counsel and Charging Party, as the parties opposed to deferral, to establish that either of these standards has not been met. After careful review of the record, we find that it does not establish that the statutory and unfair labor practice issues are not factually parallel or that the facts relevant to resolving the unfair labor practice issue were not presented generally to the arbitrator.

In examining the discharges here, the arbitrator was specifically presented with the issue of whether the terminations were violative of the Act. Moreover, in resolving that issue and finding that the Charging Party was discharged for cause, the arbitrator specifically considered and rejected the Union's contention that because the Charging Party was a union steward, he was protected by the Act against discipline for anything he might have done in connection with processing the grievance. Similarly, as to the other grievants, the arbitrator specifically determined that the Act provides no protection for employee interference with a company grievance investigation. In this regard, the arbitrator concluded that the Respondent committed no unfair labor practice under the Act when it discharged these employees. Thus, the arbitrator was specifically presented with the question of whether the grievants were discharged for activity protected under the Act and concluded that they were not. Therefore, given the manner in which the issues here were framed, presented to, and resolved by the arbitrator, it is clear that the contractual and unfair labor practice issues were factually parallel and that he was presented generally with the facts relevant to determining whether the Respondent's conduct constituted an unfair labor practice. Moreover, the arbitrator actually made a determination that the Respondent's conduct was not unlawful under the Act.

Accordingly, we shall defer to the resolution of the grievances by the arbitrator, grant the Respondent's Motion for Summary Judgment, and dismiss the complaint.

ORDER

The complaint is dismissed.